(2)

Supreme Court, U.S.
FILED
NOV 10 1997
CLERK

No. 97-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT DELTA AIR LINES, INC. IN OPPOSITION

J. Michael Garner
LAW DEPARTMENT
DELTA AIR LINES, INC.
Hartsfield Atlanta
International Airport
Atlanta, Georgia 30320
(404) 715-2600

William H. Boice
Counsel of Record
Stephen E. Hudson
KILPATRICK STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
(404) 815-6500

Attorneys for Respondent Delta Air Lines, Inc.

CASILLAS PRESS, 1717 K STREET, N.W., WASHINGTON, D.C. 20006 - 202-223-1220

3688

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit correctly affirm the district court's judgment dismissing Petitioners' "failure to hire" age discrimination claims against Respondent Delta Air Lines, Inc. ("Delta") under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*, where the Asset Purchase Agreement (the "APA") between Delta and Pan American World Airways, Inc. ("Pan Am") specified that Delta would hire only those Pan Am pilots who were "fully trained and currently qualified" on the aircraft that Delta was acquiring from Pan Am, and it is undisputed that the Pan Am pilots Delta did hire were fully trained and currently qualified on those aircraft but Petitioners were not?

2. Did the Court of Appeals correctly affirm the district court's judgment dismissing Petitioners' "failure to train" age discrimination claims where the APA specifically provided that any training of Pan Am pilots at Pan Am was solely Pan Am's responsibility, the APA did not give Delta the power to control how Pan Am selected its pilots for training, and each Petitioner was in fact offered training by Pan Am to become qualified for employment by Delta on the same terms and under the same conditions as was offered to similarly situated pilots at Pan Am?

3. Did the Court of Appeals correctly affirm the district court's judgment dismissing Petitioners' disparate impact age discrimination claims where it is undisputed that Delta offered employment to the Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft with the result that 94.1% of the former Pan Am pilots hired by Delta were age 40 or older, 68.3% of the former Pan Am pilots hired by Delta were age 50 or older, and only 5.9% of the former Pan Am pilots hired by Delta were under age 40, and Petitioners

offered no evidence that any facially neutral employment policy had an adverse or disparate impact on the relevant statistical population?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

TABLE OF AUTHORITIES ..... (iv)

STATEMENT OF THE CASE 1

Factual Background 1

The District Court's Decision 6

The Second Circuit's Decision 7

REASONS FOR DENYING THE WRIT 9

I. The Second Circuit's Decision Was Correct 9

A. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Hire" Age Discrimination Claims 9

1. Petitioners Failed to Establish a Prima Facie Case 10

2. Petitioners Offered No Evidence That the Legitimate, Non-Discriminatory Reason Articulated by Delta for Not Hiring Them Was Pretextual 12

B. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Train" Age Discrimination Claims 16

C. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' Age Discrimination Claims Under a Disparate Impact Theory 18

II. No Issue Worthy of the Court's Certiorari Review is Presented by the Petition 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases	Page
Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990)	10
Criley v. Delta Air Lines, Inc., 119 F.3d 102 (2d Cir. 1997) (*per curiam*)	*passim*
District Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347 (2d Cir. 1997)	18
EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984)	21
EEOC v. Wyoming, 460 U.S. 226	15-16
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)	22
Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949)	22
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	*passim*
Jackson v. Harvard Univ., 900 F.2d 464 (1st Cir), *cert. denied*, 498 U.S. 848 (1990)	10
Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157 (2d Cir. 1991), *cert denied*, 502 U.S. 880 (1991)	11
Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990)	8, 19
Maresco v. Evans Chemetics, Div. of W. R. Grace & Co., 964 F.2d 106 (2d Cir. 1992)	18-19
NCAA v. Board of Regents, 468 U.S. 85 (1984)	22
O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307 (1996)	10, 13-14, 21
Pan Am Corp. v. Delta Air Lines, Inc. 175 B.R. 438 (S.D.N.Y. 1994)	2
Rogers v. Lodge, 458 U.S. 613 (1982)	22
St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993	10, 12
Taggart v. Time Inc., 924 F.2d 43 (2d Cir. 1991)	10

Cases (cont'd) **Page**

Teamsters v. United States, 431 U.S. 324 (1977) 10

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 12

Texas v. Mead, 465 U.S. 1042 (1984) 22

Tyler v. Bethlehem Steep Corp., 958 F.2d 1176 (2d Cir), *cert. denied*, 506 U.S. 826 (1992) 10

United States v. Johnston, 268 U.S. 220 (1925) 22

Statutes

29 U.S.C. § 621, *et seq.* ..... *passim*

New York State Human Rights Law, Exec. Law § 296(1) (McKinney's 1993) 6

Rules

14 C.F.R. § 121.383(c) 7

Fed. R. Civ. P. 19 6

Sup. Ct. R. 10 21

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs and appellants below, were formerly employed as pilots by Pan Am. They allege that Respondent Delta, defendant and appellee below, discriminatorily denied employment to them because of their ages. They claim that Delta should have hired them instead of some of the 774 former Pan Am pilots that it did hire (median age 52) when it acquired certain Pan Am assets in 1991. The district court judge dismissed Petitioners' age discrimination claims, and the Court of Appeals for the Second Circuit affirmed. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997) (*per curiam*).

The Court should deny Petitioners' request for a writ of certiorari not merely because the Second Circuit's decision was correct in all respects, but most importantly because no legal issue worthy of the Court's certiorari review is presented by the Petition. Indeed, the first three legal issues identified in the Petition as "Questions Presented" are not in fact presented by this case, although they would not justify this Court's certiorari review even if they were presented. As to the fourth and final issue, which Petitioners acknowledge "this Court may wish to decline to address as being premature," Pet. 4, it is likewise not properly presented by the claims of these Petitioners.

STATEMENT OF THE CASE

Factual Background

Plaintiffs' two-paragraph description of the facts (Pet. 2-3) is incomplete and inaccurate, and the unsupported factual assertions in the remainder of their Petition are a gross distortion of the record evidence. The entire Petition is based on an unsupported and erroneous factual predicate. A complete

statement of the undisputed facts relevant to the Petition is set forth below.

In early 1991, Pan Am filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. In July 1991, Pan Am and Delta entered into an Asset Purchase Agreement, dated as of July 27, 1991, pursuant to which Delta agreed to acquire certain equipment and routes from Pan Am. The equipment that Delta agreed to acquire pursuant to the APA included certain Airbus A-310 and Boeing 727 commercial aircraft. APA, §§ 2.1(b) and 2.2(b). The APA specified that there would be an interim closing on or about September 1, 1991, for Delta's purchase of the Pan Am Shuttle, and a final closing on November 1, 1991, for Delta's purchase of the remainder of the assets that it had agreed to acquire. On August 12, 1991, the APA was approved by the United States Bankruptcy Court for the Southern District of New York. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y. 1994).

The APA provided that Delta would hire "at least" 700 Pan Am pilots to fly the A-310 and B-727 aircraft that it had agreed to acquire:

> [Delta] will offer employment to at least seven hundred (700) of [Pan Am's] pilots, ***who must be fully trained and currently qualified*** in the Boeing 727 or Airbus A-310 categories . . . ***as of November 1, 1991*** . . . and who must meet all of [Delta's] standards and requirements for pilots . . . in order to be eligible for consideration by [Delta] hereunder. . . . ***[Pan Am's] pilots who meet such requirements will be offered employment with [Delta] in seniority order by category.***

APA, § 5.9(h)(i) (emphasis added): 2a.

The APA provided that Pan Am would be solely responsible for any training that it chose to offer to its own pilots who were flying other aircraft so that they could become "fully trained and currently qualified" on the aircraft that Delta was acquiring:

> Any training of [Pan Am's] pilots required to make them fully trained and currently qualified in the applicable Airbus A-310 or Boeing 727 categories as described in subsection 5.9(h)(i) hereof shall be the responsibility of and undertaken at the expense of [Pan Am].

APA, § 5.9(h)(iv): 3a. Contary to Petitioners' unsupported assertion, Delta did not "authorize[] Pan Am to . . . interview, screen and retrain the Pan Am pilots for potential hire or re-hire by Delta." Pet. 2.

The priority in which Pan Am pilots were considered eligible to be hired by Delta pursuant to the APA was dependent upon two determinations: (1) identifying which Pan Am pilots were or would become "fully trained and currently qualified" on the A-310 or B-727 aircraft by the closing dates, and (2) ranking those pilots "in seniority order by category" for the two aircraft as of the relevant dates. Both of these determinations were made by Pan Am, not by Delta.

At various times between mid-August and late October 1991, Pan Am supplied Delta with lists of its pilots who were or would become "fully trained and currently qualified" on the A-310 and B-727 aircraft by the closing dates. Pan Am ranked the pilots on the lists on the basis of their Pan Am seniority. There is no evidence to support Petitioners' assertion that Delta "design[ed] and caus[ed] Pan Am to implement a series of pilot selection procedures which minimized the number of the oldest pilots [that] Delta would have to hire." Pet. 2.

Delta reviewed the lists of pilots received from Pan Am, contacted each pilot, and determined who was interested in employment with Delta. Those pilots who were interested were scheduled for interviews. Delta filled its staffing requirements for the A-310 aircraft with the most senior fully trained and currently qualified pilots for the respective positions on that aircraft based on the lists supplied by Pan Am. Likewise, Delta filled its staffing requirements for the B-727 aircraft with the most senior fully trained and currently qualified pilots for the respective positions on that aircraft based on the lists supplied by Pan Am. Delta eventually hired 774 former Pan Am pilots — 74 more than it was contractually obligated to hire.

Thus, being placed by Pan Am on a list of "fully trained and currently qualified" pilots on the A-310 or B-727 and having sufficient Pan Am seniority were prerequisites for consideration for employment at Delta. None of the Petitioners, however, was "fully trained and currently qualified" on either the A-310 or the B-727 as of the final closing date. Delta did not hire or even contact Petitioners because their names did not appear on the lists of fully trained and currently qualified A-310 or B-727 pilots supplied to Delta by Pan Am.

Although none of the Petitioners was "fully trained and currently qualified" on either the A-310 or the B-727, in late August 1991 Pan Am offered to train each of the Petitioners on the B-727 so that they could become eligible for employment by Delta on that aircraft by November 1, 1991. Each of the Petitioners declined Pan Am's offer of training. If Petitioners had accepted Pan Am's offers of training and successfully completed the training, they would have been included on the lists of fully trained and currently qualified B-727 pilots supplied to Delta by Pan Am.

Petitioners declined Pan Am's offers of training because they were Captains on the B-747 aircraft at Pan Am, which was a larger and higher-paying aircraft than the B-727. At the time, it was anticipated that Pan Am would continue in business and would use the B-747 aircraft in its operations. Petitioners elected to remain at Pan Am flying the B-747 rather than accept Pan Am's offer of training on the B-727 to become eligible for hire by Delta as B-727 pilots. Other Pan Am pilots of Petitioners' ages accepted Pan Am's offers, were trained in place of Petitioners, and were ultimately hired by Delta.

Despite Petitioners' allegations of age bias, Delta hired a very senior group of Pan Am pilots. 728 of the 774 (or 94.1%) of the former Pan Am pilots hired by Delta were age 40 or older. 529 of the 774 (or 68.3%) of the former Pan Am pilots hired by Delta were age 50 or older. Only 46 of the 774 (or 5.9%) of the former Pan Am pilots hired by Delta were under age 40. The mean age of the group hired by Delta from Pan Am was 50, and the median age was 52.

Pan Am ceased its airline operations in December 1991. At that point, Petitioners realized that they had made a mistake in electing to remain at Pan Am as B-747 Captains. They filed charges of discrimination against Delta with the Equal Employment Opportunity Commission (the "EEOC"). That agency investigated the allegations of discrimination but rejected them as follows:

> The evidence gathered during the investigation does not disclose that [Delta] intended to discriminate against [Petitioner] individually, nor against the most senior pilots as a group, and the ages of the pilots actually hired does not lead to a presumption that there was an intent to exclude the oldest pilots or the most senior pilots.

> Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

6a.

The District Court's Decision

Petitioners filed this action in the United States District Court for the Eastern District of New York in April 1993. They asserted age discrimination claims against Delta[1] under both the federal Age Discrimination in Employment Act of 1967 (the "ADEA"), as amended, 29 U.S.C. § 621, *et seq.*, and the New York State Human Rights Law, Exec. Law § 296(1) (McKinney's 1993). After two years of discovery, the district court judge, The Honorable Jack B. Weinstein, granted Delta's motion for summary judgment and dismissed Petitioners' complaint in an unpublished order. The district court judge concluded:

> This was essentially a turn-key operation. Pan Am turned over aircraft and pilots authorized and trained to operate those aircraft. There's no showing of any intention to discriminate on the basis of age.

Petitioners' Appendix, 17a. Petitioners filed a motion for reconsideration but the district court judge adhered to his earlier ruling.

---

[1] Petitioners asserted no substantive claims against the other respondent, the Air Line Pilots Association ("ALPA"), which was also a defendant and appellee below. ALPA was joined as a defendant, pursuant to Fed. R. Civ. P. 19, because of its "interest in the subject matter of this action, and in order that complete and effective disposition of the [Petitioners'] claims can be made herein."

The Second Circuit's Decision

The Court of Appeals for the Second Circuit affirmed the district court's judgment dismissing Petitioners' age discrimination claims. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997) (*per curiam*). As to Petitioners' disparate treatment claims, the Second Circuit held that "the record before the district court raised no genuine factual issue of discrimination on Delta's part." *Id.* at 103. The Second Circuit found that Delta had "offered unrebutted age-neutral explanations" for not hiring Petitioners: They were not identified on Pan Am's list of "fully trained and currently qualified" pilots on the aircraft Delta was acquiring. *Id.* at 104-05.

In rejecting Petitioners' pretext evidence concerning the legitimate, non-discriminatory reason articulated by Delta for not hiring them, the Second Circuit referred to "a variety of unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age." *Id.* at 105. The evidence consisted of comments in notes taken during the exploratory stage of the Delta-Pan Am transaction, which merely recorded accurate information about the ages of the Pan Am pilot work force. The comments had nothing to do with Petitioners, why they were not hired by Delta, or any issue relevant to this case. Referring to these comments, the Second Circuit stated, in *dicta*, that "[n]one of the statements cited by [Petitioners] reflect any age-based stereotype or belief that older pilots are less competent than younger ones." *Id.* at 105. Although unnecessary to its decision, because the evidence did not relate to Delta's legitimate, non-discriminatory reason, the Second Circuit observed that "[t]o the extent the comments cited by [Petitioners] implicate age at all, they express considerations of the business effects of the federally mandated retirement age [of 60 for commercial airline pilots under 14 C.F.R. § 121.383(c)], not assump-

tions about employees' abilities based on their age." 119 F.3d at 105. While the comments might indicate some concern about the cost of hiring those pilots who were close to retirement, there was no showing that this was a factor considered or acted upon by Delta, as Delta later agreed in the APA to hire, in seniority order (and regardless of age or proximity to retirement), those Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft by the closing dates. The Second Circuit nevertheless stated, relying on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that "employment decisions driven by factors that are empirically intertwined with age are not discriminatory so long as they are motivated by 'some feature other than the employee's age.'" 119 F.3d at 105 (quoting *Hazen*, 507 U.S. at 609).

Contrary to Petitioners' assertions, the Second Circuit neither held nor implied that "the evidence adduced by Petitioners showed that Delta declined to hire pilots over age 55," Pet. 12, or that "Petitioners, in the Second Circuit's view, were refused employment by Delta because [of] their respective ages, *per se*." *Id.* at 13. These assertions find no support in the Second Circuit's opinion.

As to Petitioners' disparate impact claim, the Second Circuit acknowledged that "the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA." 119 F.3d at 105 (citing *Hazen*, 507 U.S. at 610). The court recognized that prior Second Circuit decisions had permitted a disparate impact theory of liability under the ADEA but had limited it to claims "alleg[ing] a disparate impact on the entire protected group, *i.e.*, workers aged 40 and over." 119 F.3d at 105 (citing *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372-73 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990)). The Second Circuit concluded that since Petitioners "acknowledge that 94.1% of the pilots Delta

hired were aged 40 and older and that the hiring scheme had no negative impact on the overall group of Pan Am pilots aged 40 and older[,] . . . [their] disparate impact claim cannot survive" under existing Second Circuit precedent. 119 F.3d at 105.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision Was Correct.

The ADEA prohibits discrimination with respect to the employment of workers age 40 or older on the basis of age. 29 U.S.C. §§ 621, 623, 631 (1994). Petitioners' request for a writ of certiorari is based entirely on the erroneous premise that the Second Circuit affirmed the dismissal of Petitioners' age discrimination claims despite finding that they had suffered "an adverse employment action" because of their ages. Pet. i, 12-13. To the contrary, the Second Circuit affirmed the district court's judgment precisely because it concluded the exact opposite. Here, the EEOC, the district court, and the Second Circuit have all concluded that Petitioners have failed to come forward with evidence that Delta discriminated against them in any respect because of their ages.

A. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Hire" Age Discrimination Claims.

In a "failure to hire" discrimination case, each plaintiff bears the burden of proving that the adverse employment decision about which he complains was a result of intentional discrimination. In this case, Petitioners had no direct evidence[2] that

[2] Direct evidence of discrimination is evidence which, if believed, would prove without inference or presumption that the affected employee was

any action by Delta was motivated by their ages. The establishment of a discriminatory motive was thus governed by the allocations of burdens and order of proof most recently expressed in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Petitioners cannot establish a *prima facie* case of age discrimination because they could not show that they were qualified for the pilot positions that Delta offered to the Pan Am pilots. Even if Petitioners had established a *prima facie* case, the Second Circuit correctly held that they offered no evidence that the legitimate, non-discriminatory reason articulated by Delta for not hiring them was pretextual.

1. Petitioners Failed to Establish a *Prima Facie* Case.

To establish a *prima facie* case of age discrimination in a "failure to hire" context, each Petitioner was required to show that (1) he belongs to the protected age group, (2) he applied for and was qualified for the position sought, (3) he was not hired despite his qualifications, and (4) the position was ultimately filled by a younger person. *Taggart v. Time Inc.*, 924 F.2d 43, 46 (2d Cir. 1991). In *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996), this Court held that a *prima facie* case under the ADEA "requires '*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . ..*'" *Id.* at 1310 (emphasis in opinion) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)).

---

discriminated against. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990).

Petitioners could not even establish a *prima facie* case because they could not show that they were qualified for the pilot positions that Delta offered to the Pan Am pilots. It is undisputed that none of the Petitioners was fully trained and currently qualified on either the A-310 aircraft or the B-727 aircraft as of November 1, 1991. It is also undisputed that none of their names appeared on the lists of fully trained and currently qualified A-310 pilots or B-727 pilots supplied by Pan Am to Delta. It is further undisputed that only those Pan Am pilots whose names appeared on the lists of fully trained and currently qualified A-310 pilots or B-727 pilots supplied by Pan Am to Delta were eligible for hire by Delta.

Petitioners' inability to establish the "qualification" prong of the second element of their *prima facie* case required the dismissal of their "failure to hire" age discrimination claims, and neither the district court nor the Second Circuit needed to proceed any further in their analysis. *See Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161-162 (2d Cir.1991) ("Having found that [the plaintiff] did not meet his initial burden of producing sufficient evidence to establish a *prima facie* case [of discrimination], the trial judge was under no obligation to proceed further . . . ."), *cert. denied*, 502 U.S. 880 (1991). In this case, the Second Circuit merely assumed that Petitioners had established a *prima facie* case, and proceeded to consider Delta's articulated, legitimate, nondiscriminatory reason for not hiring them. But the evidence is undisputed that Petitioners have not established, and cannot establish, a *prima facie* case of age discrimination against Delta.

2. Petitioners Offered No Evidence That the Legitimate, Non-Discriminatory Reason Articulated by Delta for Not Hiring Them Was Pretextual.

Even if each Petitioner had established a *prima facie* case, such proof merely would have created a rebuttable presumption of discrimination that Delta could dispel by articulating a legitimate, non-discriminatory reason for its action. *Hicks*, 509 U.S. at 506. In this case, the Second Circuit correctly held that Delta had dispelled any presumption that might have been created by a *prima facie* case by its articulated, legitimate, non-discriminatory reason for not hiring Petitioners: They were not identified on Pan Am's lists of fully trained and currently qualified pilots on the aircraft that Delta was acquiring. 119 F.3d at 104-05.

This legitimate, non-discriminatory explanation for Delta's failure to hire Petitioners would have destroyed any inference of discrimination that might have been created if Petitioners had been able to establish a *prima facie* case. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). Once a defendant articulates a legitimate, non-discriminatory reason for its action, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253. *Hicks* explained that the articulated "reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515-16 (emphasis in opinion) (quoting *Burdine*, 450 U.S. at 253).

With regard to each Petitioners' first burden, there is *no* evidence that the reason Delta has articulated for not hiring

him is false. Indeed, it is undisputed, by Petitioners' own admissions, that they were not fully trained and currently qualified on either the A-310 or the B-727 as of November 1, 1991. It is also undisputed that their names did not appear on the lists of fully trained and currently qualified pilots that Pan Am sent to Delta. Likewise, it is undisputed that their names had to be on those lists to be eligible for hire by Delta. The Second Circuit thus correctly concluded that "the record before the district court raised no genuine factual issue of discrimination on Delta's part." 119 F.3d at 103.

With regard to the second burden, there is *no* evidence that Delta was actually motivated not to hire Petitioners because of their ages. The "variety of unconnected fragments of evidence" referred to in the Second Circuit's opinion, *id.* at 105, and quoted by Petitioners, Pet. 2-3 n.3, had nothing to do with Petitioners or why they were not hired by Delta. None of these "unconnected fragments of evidence" were or reflected "ageist directives to Pan Am," Pet. 2, and, contrary to Petitioners' assertion, none of them "reveal[ed] a clear disinclination on Delta's part to having too large a number of the oldest Pan Am pilots join its job ranks." Id. at 3.

Any assertion that Delta did not hire Petitioners because of their ages or that Delta was biased against older pilots in general is refuted by Delta's agreement to offer employment in seniority order and the resulting statistics of the group Delta hired (discussed *supra*), which show very favorable treatment of older pilots. For example, 94.1% of the former Pan Am pilots hired by Delta were age 40 or older, and 68.3% were age 50 or older. Delta hired 145 Pan Am pilots who, like Petitioners, were 55 years of age or older. There is no significant difference between the median age of the 774 pilots hired by Delta (52) and the ages of the class (55 years and older) Petitioners seek to represent. In *O'Connor v. Consolidated Coin*

Caterers Corp., *supra*, this Court held unanimously that evidence of "the replacement of a 68 year-old by a 65 year-old" is "very thin evidence" of age discrimination, and that an inference of age discrimination "can not be drawn from the replacement of one worker with another worker insignificantly younger." 116 S.Ct. at 1310.

Petitioners misrepresent the Second Circuit's reliance on *Hazen* in dismissing Petitioners' arguments about the "unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age." 119 F.3d at 105. Although this portion of the Second Circuit's opinion was completely unnecessary to its decision, because none of the "fragments of evidence" referred or related to Petitioners or why they were not hired by Delta, the Second Circuit observed, in *dicta*, that "[n]one of the statements cited by [Petitioners] reflect any age-based stereotype or belief that older pilots are less competent than younger ones." *Id.* "To the extent the comments cited by [Petitioners] implicate age at all," the Second Circuit observed, "they express considerations of the business effects of the federally mandated retirement age, not assumptions about employees' abilities based on their age." *Id.* Citing *Hazen*, the Second Circuit stated that "employment decisions driven by factors that are empirically intertwined with age are not discriminatory so long as they are motivated by 'some feature other than the employee's age.'" *Id.* (quoting *Hazen*, 507 U.S. at 609).

The "comments" referred to by the Second Circuit were found in notes taken during the exploratory stage of the Delta-Pan Am transaction, where accurate information about the ages of some of the Pan Am employees was recorded. The comments did not relate to Delta's later agreement to hire, in seniority order, Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft, or Pan Am's

training of its pilots to make them eligible for hire by Delta, or any other issue in this case. Therefore, the comments were completely irrelevant to Petitioners' claims against Delta. But the Second Circuit proceeded to the next step and found that the comments did not even indicate "age bias" generally, but merely an awareness of the ages of the Pan Am pilots. 119 F.3d at 105. Thus, the Second Circuit's observations cited by Petitioners — about whether acting on factors that are "empirically intertwined with age" is actionable under the ADEA — are clearly *dicta* since they were unnecessary to the decision in this case, and involved a purely hypothetical situation since there is no evidence of any employment decision based on concerns about increased costs, proximity to retirement age, or any factor that is "empirically intertwined with age." Indeed, the statistical evidence discussed above demonstrates that Delta's agreement to hire, in seniority order, those Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft by the closing dates included pilots of all ages, including large numbers of older Pan Am pilots who were very close to retirement age.

In any event, nothing in the Second Circuit's decision is in conflict with, or contrary to, *Hazen*. *Hazen* considered "the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age." 507 U.S. at 608. This Court held, unanimously, that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609. The Court explained:

> It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in *EEOC v. Wyoming*,

> 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

Id. at 610. The Court concluded that "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 611.

B. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Train" Age Discrimination Claims.

Faced with the undisputed facts in this case, Petitioners tacitly conceded below that they had failed to establish a *prima facie* case of age discrimination against Delta directly for failing to hire them. In their brief to the Second Circuit, they accused Delta of "mischaracteriz[ing] the instant case as one involving a 'failure to hire.' " 8a. Instead, according to Petitioners' brief to the Second Circuit, "the age discrimination occurred before the hiring took place" and was Pan Am's failure to train them so that they could become eligible to be hired by Delta. *Id.* (emphasis in original).

Although the Second Circuit did not directly address Petitioners' "failure to train" age discrimination claims, it implicitly — and correctly — affirmed the district court's dismissal of those claims. Pan Am was not Delta's "agent," and the APA did not appoint Pan Am to act as Delta's agent with regard to any retraining done at Pan Am of Pan Am pilots wanting to become eligible for employment with Delta. Nothing in

that agreement gave Delta the power to control whether Pan Am offered any training to its own pilots or how Pan Am selected its pilots for training. As quoted above, whether Pan Am offered or provided training so that non-qualified Pan Am pilots could become "fully trained and currently qualified" on the acquired aircraft by the closing dates was solely within the discretion and control of Pan Am. APA, § 5.9(h)(iv): 3a. Petitioners offered no evidence that Delta controlled how Pan Am selected its own pilots for training so that they could become "fully trained and currently qualified" on the acquired aircraft by the closing dates. Petitioners have not cited any legal authority holding that Delta could be held liable for any "age discrimination" of Pan Am under the facts of this case.

Petitioners not only offered no evidence that Delta controlled how Pan Am selected its own pilots for training, but it is undisputed that Pan Am did, in fact, offer training to each Petitioner so that he could become "fully trained and currently qualified" on the B-727 aircraft by November 1, 1991. Each elected to remain at Pan Am flying the B-747 rather than accept Pan Am's offer of training on the B-727 so that he could become eligible for hire by Delta as B-727 pilots. Petitioners' failure to accept Pan Am's offer of training should bar all of their claims as a matter of law. Petitioners' failure to receive the training they needed at Pan Am so that they could have become eligible to be hired by Delta was a result of their own decisions for which they are responsible, not because of anything that Delta did to them.

Finally, Petitioners argued in the district court and before the Second Circuit — but not in their Petition here — that Delta's "age discrimination" consisted of its failure to change the APA unilaterally and adopt a pilot proposal (known as the "system-wide seniority transfer" proposal) that would have

required bankrupt Pan Am to continue to train Pan Am pilots after the closing for eventual hire by Delta so that the most senior pilots could keep their options open about going to Delta or remaining at Pan Am. 119 F.3d at 104. There is no evidence that Pan Am or its creditors would have ever agreed to the proposal or that it would have made any difference to which Pan Am pilots were ultimately hired by Delta, nor is there any evidence that Delta rejected the proposal for age biased reasons. Thus, the Second Circuit correctly concluded that Delta's "age-neutral explanations for its decision to reject the 'system-wide seniority transfer' proposal" were "unrebutted," and "not effectively contradicted" by Petitioners. *Id.*

C. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' Age Discrimination Claims Under a Disparate Impact Theory.

Petitioners' disparate impact claim was based on nothing more than a simplistic comparison of the number of Pan Am pilots age 55 and older who remained at Pan Am with the number of Pan Am pilots of the same age who accepted employment at Delta. Petitioners made no attempt to distinguish between those Pan Am pilots who, like Petitioners, elected to remain at Pan Am and those Pan Am pilots who wanted to be hired by Delta but were not. Petitioners submitted no evidence that any facially neutral employment policy disqualified a disproportionate percentage of older Pan Am pilots who wanted to be hired by Delta.

The Court has never decided whether a disparate impact theory of liability is available under the ADEA. *Hazen*, 507 U.S. at 610. The Second Circuit has recognized such an action. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Maresco v.*

Evans Chemetics, Div. of W. R. Grace & Co., 964 F.2d 106, 115 (2d Cir. 1992). However, the Second Circuit has held that to establish a disparate impact claim under the ADEA, plaintiff must show a disparate impact on the entire protected group, *i.e.*, workers age 40 and older, and not merely a disparate impact on a particular sub-group, *e.g.*, workers age 55 and older. *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372-73 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

In this case, the Second Circuit correctly affirmed the district court's dismissal of Petitioners' disparate impact claims under existing Second Circuit precedent. As the Second Circuit observed, Petitioners "acknowledge that 94.1% of the pilots Delta hired were aged 40 and older and that the hiring scheme had no negative impact on the overall group of Pan Am pilots aged 40 and older." 119 F.3d at 105. Thus, under existing Second Circuit precedent, "[Petitioners'] disparate impact claim cannot survive." *Id.* In any event, Petitioners produced no evidence that would support a disparate impact claim for any sub-group of the protected class.

II. No Issue Worthy of the Court's Certiorari Review is Presented by the Petition.

Petitioners' request for a writ of certiorari should be denied not merely because the Second Circuit's decision was correct, but most importantly because the Petition presents no issue worthy of the Court's certiorari review. The first three legal issues identified in the Petition as "Questions Presented" are not in fact presented by this case, although they would not justify this Court's certiorari review even if they were presented.

Questions Nos. 1-3 are explicitly based on the erroneous premise that the Second Circuit affirmed the dismissal of Peti-

tioners' claims despite finding that Petitioners were subjected to "an adverse employment action based on . . . [their] age" (Questions Nos. 1 and 2) and "based on [their] proximity . . . to a predetermined . . . retirement age" (Question No. 3). The Second Circuit, however, made no such finding. It is undisputed that Delta did not hire Petitioners because their names did not appear on the list of "fully trained and currently qualified" A-310 or B-727 pilots supplied to Delta by Pan Am. The Second Circuit thus correctly affirmed the district court judge's dismissal of Petitioners' age discrimination claims precisely because "the record before the district court raised no genuine factual issue of discrimination on Delta's part." 119 F.3d at 103.

Even Petitioners concede that "this Court may wish to decline to address Question No. 4 as being premature." Pet. 4. That is so, according to Petitioners, because Question No. 4 "relat[es] to the applicability of the disparate impact doctrine to an ADEA subclass, *i.e.*, those persons age 55 and over," but "Petitioners recognize that the threshold issue, whether the so-called disparate impact analysis is cognizable for claims under the ADEA, has not yet been decided by this Court." *Id.*

Moreover, this case is a particularly poor vehicle for the Court to consider whether a disparate impact claim is available under the ADEA, since that issue is purely hypothetical here. First, Petitioners have identified no facially neutral employment policy that disqualified them from employment with Delta. To the contrary, the evidence is undisputed that Petitioners were in fact offered training by Pan Am so that they could become eligible for hire by Delta but they rejected the offer of training. Second, Petitioners have presented no statistical evidence showing that any facially neutral employment policy had an adverse impact on the relevant population — those older

Pan Am pilots who wanted to be hired by Delta but were prevented from doing so by a Delta policy or decision, which is a much different population from those Pan Am pilots who, like Petitioners, rejected Pan Am's offer of training and chose to remain in more lucrative positions at Pan Am.

The Petition satisfies none of the considerations for certiorari review set forth in Sup. Ct. R. 10. The Second Circuit in this case did not decide an important question of federal law that has not been, but should be, settled by this Court, nor did the Second Circuit decide an important federal question in a way that conflicts with relevant decisions of this Court. Although Petitioners contend that particular language used by this Court in its unanimous decision in *Hazen* "has spawned great debate among the Circuits," Pet. 8, Petitioners fail to cite even a single circuit court case expressing confusion or uncertainty over *Hazen*. Nor has the Second Circuit so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Although Petitioners contend that the Second Circuit's refusal to recognize disparate impact claims under the ADEA for sub-groups of the protected class conflicts with the Ninth Circuit's decision in *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), Pet. 22, no conflict is in fact presented. The Ninth Circuit in *Borden's* recognized the disparate impact theory of liability under the ADEA, but it did not consider whether such a claim was available if the challenged employment policy adversely impacted only a sub-group of the protected class, e.g., workers age 55 and older, as opposed to the entire protected class. Instead, in *Borden's*, which predated this Court's more recent ADEA decision in *Hazen* and *O'Connor*, the Ninth Circuit considered only the defendant employer's argument that the disparate impact theory did

not apply to (1) lawsuits under the ADEA or (2) lawsuits concerning employee compensation. 724 F.2d at 1394. Moreover, as noted above, this issue concerns Question No. 4, which, as Petitioners concede, "this Court may wish to decline to address . . . as being premature." Pet. 4.

At most, Petitioners are merely complaining about the Second Circuit's analysis of the particular facts involved in this case. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). Indeed, this Court has indicated that it is even less likely to review a case where, as here, the factual analysis and conclusion of the district court has received the concurrence of the court of appeals. In that situation, the Court has often stated that it is not "a court for correction of errors in fact finding," and that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *accord, Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Here, the EEOC, the district court, and the Second Circuit have all concluded that Petitioners have failed to come forward with evidence that Delta discriminated against them because of their ages. Such "a very obvious and exceptional show of error" is not present in this case.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. Michael Garner
LAW DEPARTMENT
DELTA AIR LINES, INC.
Hartsfield Atlanta
International Airport
Atlanta, Georgia 30320
(404) 715-2600

William H. Boice
Counsel of Record
Stephen E. Hudson
KILPATRICK STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
(404) 815-6500

Attorneys for Respondent Delta Air Lines, Inc.

ASSET PURCHASE AGREEMENT

AMONG

PAN AM CORPORATION,

PAN AMERICAN WORLD AIRWAYS, INC.

PAN AM SHUTTLE, INC.

AND

DELTA AIR LINES, INC.

JULY 27, 1991

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT dated July 27, 1991 among Pan Am Corporation, a Delaware corporation ("Parent"), Pan American World Airways, Inc., an indirect wholly-owned subsidiary of Parent and a New York corporation ("Airways"), Pan Am Shuttle Inc., a wholly-owned subsidiary of Parent and a Delaware corporation ("Shuttle"), debtors-in-possession (Shuttle and Airways being referred to herein collectively as "Sellers" and each individually as a "Seller"; where appropriate, the terms Seller or Sellers shall refer only to the applicable Seller), and Delta Air Lines, Inc., a Delaware corporation ("Buyer").

* * *

5.9(h)(i) Buyer will offer employment to at least seven hundred (700) of Sellers' pilots, who must be fully trained and currently qualified in the Boeing 727 or Airbus A-310 categories (*i.e.*, Airbus A-310 Captain, Boeing 727 Captain, Airbus A-310 First Officer, Boeing 727 First Officer, Boeing 727 Second Officer) as of November 1, 1991 (subject to subsections 5.9(h)(ii) and (v) hereof), or such other date as may be agreed upon in writing by Buyer and Sellers, and who must meet all of Buyer's standards and requirements for pilots, including without limitation medical requirements, in order to be eligible for consideration by Buyer hereunder. Subject to subsections 5.9(h)(iii) and (vii), Sellers' pilots who meet such requirements will be offered employment with Buyer in seniority order by category. Except as provided in subsection 5.9(h)(ii), such offers shall be for employment effective upon the Closing. Buyer shall determine in its sole discretion the number of Sellers' pilots in each such category to whom Buyer will offer employment.

* * *

(iv) Any training of Sellers' pilots required to make them fully trained and currently qualified in the applicable Airbus A-310 or Boeing 727 categories as described in subsection 5.9(h)(i) hereof shall be the responsibility of and undertaken at the expense of Sellers. Any additional training that Buyer reasonably wishes to provide to Sellers' pilots to prepare them for Buyer's operations (including differences training, indoctrination, familarization, operating specifications, flight operations procedures manual and the like) will be provided at Buyer's expense, using Buyer's training personnel. Sellers shall provide their pilots reasonable time off for such training.

* * *

* * *

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the date first above written.

PAN AMERICAN WORLD AIRWAYS, INC.

BY: /s/ T.G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

DELTA AIR LINES INC.

BY: /s/ Ronald W. Allen
Name: Ronald W. Allen
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

PAN AM SHUTTLE, INC.

BY: /s/ T. G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

PAN AM CORPORATION

BY: /s/ T.G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office

David M. Criley
124 Hillcrest Avenue
Kentfield, CA 94904

Charge No. 160-92-1398

Charging Party

Delta Airlines
P.O. Box 20530
Hartsfield International Airport
Atlanta, GA 30320-2530

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under The Age Discrimination in Employment Act (ADEA)

* * *

The investigation disclosed no evidence that Respondent intentionally excluded the most senior pilots, nor that Respondent intentionally excluded the oldest pilots. Unintentional exclusion of many of the most senior pilots took place because the most senior pilots were flying equipment which Respondent does not utilize, and they were therefore not current on the equipment which Respondent does utilize.

Respondent requested that Charging Party's former employer provide them with pilots for the equipment being purchased, and gave a deadline of November 1, 1991 for these pilots to be qualified to fly Respondent's equipment.

* * *

The evidence gathered during the investigation does not disclose that Respondent intended to discriminate against Charging Party individually, nor against the most senior pilots as a group, and the ages of the pilots actually hired does not lead to a presumption that there was intent to exclude the oldest pilots or the most senior pilots.

Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

JAN 15 1993
Date

/s/ Spencer H. Lewis, Jr.
Spencer H. Lewis, Jr.
District Director

cc: William H. Boice, Esq.
Kilpatrick & Cody
1100 Peachtree Street
Atlanta, GA 30309-4530

Deborah M. Neubert, Esq.
Updike, Kelly & Spellacy
One Century Tower
265 Church Street
New Haven, CT 06510-7002

enclosure: information sheet on
filing suit in federal
district court

To be argued by
LEONARD N. FLAMM

96-7110

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

LAW OFFICES OF
LEONARD N. FLAMM
Attorneys for
Plaintiffs-Appellants
880 Third Avenue
Suite 1300
New York, New York 10022
(212) 752-3380

LEONARD N. FLAMM
NORMAN MEDNICK
MARIA D. BECKMAN
On the Brief

* * *

. . . Delta has mischaracterized the instant case as one involving a "failure to hire"; in fact, the age discrimination occurred *before* the hiring took place.[17]. . .

* * *

Dated: April 18, 1996
New York, New York

Respectfully Submitted,

THE LAW OFFICES OF
LEONARD N. FLAMM
Attorneys for Plaintiffs-
Appellants
880 Third Avenue
(Suite 1300)
New York, NY 10022
(212) 752-3380

BY: /s/ Leonard N. Flamm
Leonard N. Flamm
(LF-9523)

On the Brief:
Leonard M. Flamm
Norman Mednick
Maria D. Beckman